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Correspondence Control Unit
Attention: Information Quality Complaint Processing
U.S. Fish and Wildlife Service
1849 C Street, NW, Mail Stop 3238-MIB
Washington, D.C. 20240

Re: Formal Request for Correction of Information

This formal Request for Correction of Information is submitted under DOI/FWS Information Quality Guidelines authorized by the Data Quality Act (44 U.S.C. 3502), and is made on behalf of Mr. Jim Chilton of Chilton Ranch and Cattle Company, Arivaca, Arizona.

Requester Contact Information

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Description of Information to Correct

Cactus Ferruginous Pygmy Owl Draft Recovery Plan, January 2003, Region 2 U.S. Fish and Wildlife Service, Albuquerque, New Mexico. (68 F.R. 1189).

Proposed Rule for Designation of Critical Habitat for the Arizona Distinct Population Segment of the Cactus Ferruginous Pygmy-owl (Glaucidium brasilianum cactorum), U.S. Fish and Wildlife Service. (67 F.R. 71032).

"Early naturalists considered the [Cactus Ferruginous Pygmy Owl] "not uncommon," "of common occurrence," and a "fairly numerous" resident of lowland central and southern Arizona, prior to the mid-1900s (Breninger 1898, Gilman 1909, Swarth 1914). Since then, their numbers have almost certainly decreased, with 34 known adult [Cactus Ferruginous Pygmy Owls] documented in 2000 and 36 in 2001." Draft Recovery Plan at p. 10.

"Downlisting, instead of delisting was chosen as an interim goal because of data limitations and potential uncertainties associated with the targets that will be developed for Criteria 1. These targets have yet to be developed and will be based on relatively new and potentially scant information; thus, we believe downlisting is the most conservative and biologically defensible strategy to take in this Draft Plan until more comprehensive information is available." Criterion 1 states: "The CFPO population in Arizona either reaches a size or achieves a rate of increase that ensures a high probability of persisting over the long-term. The target population size or rate of increase over a given period of time will be determined by population analyses to be conducted after essential, but currently missing, information has been collected." Draft Recovery Plan at p. ii.

"This Draft Plan is based on the best scientific information currently available." Draft Recovery Plan at p. 129.

"This proposal relies upon the best scientific and commercial data available to us including the biological and habitat information described in the draft recovery plan, and recognized principles of conservation biology." Proposed Rule for Designation of Critical Habitat, 67 F.R. at 71034.

Explanation of Noncompliance With OMB, DOI, and/or FWS Information Quality Guidelines

The fundamental premise of both the proposed rule to designate Critical Habitat and the proposal of the Draft Recovery Plan is that the Cactus Ferruginous Pygmy Owl has declined so precipitously from a former state of historic commonality in Arizona that designation of critical habitat is essential and the imposition of a recovery plan highly restrictive of agricultural, recreational, and industrial activities in Arizona is necessary.

However, objective analysis of the best scientific and commercial information currently available shows this premise to be erroneous, and reveals that the status of this owl remains relatively unchanged from the historic period (1872-1950), while population numbers have increased slightly in Arizona over the last 130 years. (See Attachment A). Thus, because both the proposal of critical habitat and the proposal of the draft recovery plan for this owl in Arizona are fundamentally flawed by this initial, erroneous premise, both therefore lack objectivity as required by OMB, DOI, and/or FWS Data Quality Guidelines and must be withdrawn until revised to conform with the correction of disseminated information requested.

A. The Information Challenged Is Not Presented In An Accurate, Clear, Complete, And Unbiased Manner

The information here challenged is not presented in an accurate, clear, complete, and unbiased manner because it misrepresents the findings of the authorities it cites (Attachment A, p. 2), relies only on a highly selective and inaccurate treatment of the best scientific and commercial information currently available, and is then used to justify the imposition of substantial restrictions on recreational, agricultural, and industrial activities in Arizona through further and improper incorporation of unclear, undefined, and unproven tenets/principles of conservation biology into the scientific evaluative process.

B. The Substance Of The Information Disseminated Is Inaccurate, Unreliable, And Biased

The substance of the challenged, disseminated information is inaccurate because it misrepresents the observations and conclusions of the authorities it cites. (See Attachment A).

The substance of the challenged, disseminated information is unreliable because it misrepresents the authorities it cites, relies only on a highly selective and inaccurate treatment of the best scientific and commercial information currently available, and is then used as improper justification for incorporating vague and unproven tenets/principles of conservation biology that are highly restrictive of recreational, agricultural, and industrial activities into the scientific evaluative process.

The substance of the challenged, disseminated information is also biased because it misrepresents the authorities it cites, relies only on a highly selective and inaccurate treatment of the best scientific and commercial information currently available, and then bootstraps from this bias the need to substantially restrict human activities in central and southern Arizona on the alleged behalf of the Cactus Ferruginous Pygmy Owl by incorporating undefined, unproven, and not

reproducible tenets/principles of conservation biology into the scientific evaluative process. (See Attachment A).

Further, the disseminated information here challenged meets OMB's definition of "influential scientific, financial, or statistical information" because it has a clear and substantial impact on important public policies and important private sector decisions. Here, the challenged, disseminated information is being used by the Fish and Wildlife Service as the basis of justification for proposing designation of over 1.2 million acres as critical habitat and the adoption of a recovery plan for this owl in Arizona that does not seek its recovery. Moreover, because of the restrictions that would be imposed on Mr. Chilton and other livestock operators by adoption of either of these proposals, the challenged, disseminated information has a clear and substantial impact on both important public policies and important private sector decisions as well. Thus, the disseminated information here challenged must also be reproducible to demonstrate its objectivity.

"Reproducibility" means that the information is capable of being substantially reproduced, subject to an acceptable degree of imprecision. 67 F.R. at 8460. Here, the challenged, disseminated information is not capable of being substantially reproduced subject to an acceptable degree of imprecision because it is inaccurate, biased, and unreliable in fundamental premise and is then made even more unreliable by its incorporation of unproven and irreproducible tenets/hypotheses of conservation biology into the scientific evaluative process. Therefore, the disseminated information here challenged also fails the Guidelines' test of objectivity because it is not reproducible.

Explanation Of The Effect Of The Alleged Error

The effect of the disseminated information here challenged is that the proposals of critical habitat designation and adoption of the draft recovery plan for the Cactus Ferruginous Pygmy Owl in Arizona are both based in fundamental premise on the information here challenged, and as a result, both will substantially and negatively impact Mr. Chilton's ability to use his ranch effectively. This is because both proposals would restrict livestock congregation and grazing activities and would also require Mr. Chilton to enter into Section 7, ESA consultation regarding the owl before he could further develope an existing, dedicated right of way on his ranch.

Recommendation And Justification For How The Information Should Be Corrected

The disseminated information here challenged should be corrected to reflect objective analysis of the best scientific and commercial information currently available regarding the historic and current status of the Cactus Ferruginous Pygmy Owl in Arizona. (See Attachment A). Thus, the information here challenged should be corrected to 1) acknowledge that the status of this owl in Arizona remains relatively unchanged while

population numbers have increased slightly over the past 130 years; 2) the designation of critical habitat for this owl in Arizona is not essential and therefore not warranted; 3) the adoption of a recovery plan calling for this owl's downlisting rather than its delisting is not necessary and therefore also not warranted; 4) all conclusions reached by injection of tenets/hypotheses of conservation biology into the scientific evaluative process are inappropriate and therefore must be stricken from both proposals; and 5) livestock grazing as currently practiced in Arizona cannot be identified as a threat calling for restriction on behalf of this owl because objective review of the best scientific and commercial information currently available does not support this claim. (See Attachments A, B).

Thank you for your consideration of this Formal Request for Correction of the disseminated information here challenged.

Sincerely,

Dennis Parker

Dennis Parker, Attorney
Representing the Requester,
Mr. Jim Chilton of Chilton Ranch and Cattle Company

ATTACHMENT "A"

THE CACTUS FERRUGINOUS PYGMY OWL IN ARIZONA: THE CASE AGAINST DESIGNATION OF CRITICAL HABITAT AND ADOPTION OF THE CURRENTLY PROPOSED RECOVERY PLAN

1. Introduction

The Fish and Wildlife Service claims that it is the Cactus ferruginous pygmy owl's precipitous decline from an historic state of regular and common occurrence in Arizona that justifies both the current proposal of critical habitat for it (67 FR 71032) and the proposal of a recovery plan aimed merely at its down-listing rather than its delisting in this state (68 FR 1189). Thus, the issue here can be reduced to the following question: does objective analysis of the best scientific and commercial information available provide substantial evidence for the Fish and Wildlife Service's claim that the Cactus ferruginous pygmy owl has declined so precipitously from a former state of historic commonality in Arizona that both designation of critical habitat and the imposition of a down-listing plan for it are lawfully justified?

The answer to this question is critical because it determines whether the Fish and Wildlife Service may lawfully designate over 1.2 million acres of land as critical habitat for this owl in Arizona, whether the Service may lawfully impose substantial restriction on recreational, agricultural, and industrial activities in central and southern Arizona on this owl's alleged behalf, and whether a recovery plan may be developed for this owl that seeks only its down-listing and not its recovery. As objective analysis of the best scientific and commercial information available shows, the answer to this question is no.

2. Objective Review Of The Best Scientific And Commercial Information Available Requires A Three-Part Analysis

According to the Fish and Wildlife Service, ..."[e]arly naturalists considered the [Cactus ferruginous pygmy owl] "not uncommon," "of common occurrence," and a "fairly numerous" resident of lowland central and southern Arizona, prior to the mid-1900s (Breninger 1898, Gilman 1909, Swarth 1914). Since then, their numbers have almost certainly decreased, with 34 known adult [Cactus ferruginous pygmy owls] documented in 2000 and 36 in 2001." Cactus Ferruginous Pygmy-Owl Draft Recovery Plan at page 10.

Contrary to the claim of the Fish and Wildlife Service, it was long before the mid-1900s that the Cactus ferruginous pygmy owl was described by any field ornithologist as a "common," "not uncommon," or "fairly numerous" resident anywhere within the lowlands of central or southern Arizona. Moreover, none of the early naturalists cited by the Service actually considered the Cactus ferruginous pygmy owl to be "not uncommon, "of common occurrence," or "fairly numerous" across the lowlands of central and southern Arizona as the Service conversely claims.

To the contrary, according to Brandt (1951), ..."[t]his tropical owlet reaches the northern fringe of its wide range along the Mexican border of the Arizona desert and may well be regarded as the rarest of the 12 strigine birds breeding there." Thus, in 1950, this tropical owlet was anything but common or fairly numerous in its regular state of occurrence in Arizona. This fact is illustrative because it reveals the biased and inaccurate manner in which the Fish and Wildife Service has manipulated the biological record to reach the converse and eroneous conclusion that Cactus ferruginous pygmy owls were historically of common, regular, and widespread occcurrence across the lowlands of central and southern Arizona.

Contrary to the approach taken by the Fish and Wildlife Service, objective review of this owl's historic and current status in Arizona demands a three-part analysis. First, the few observations of this owl's historic commonality must be reviewed. Second, these few observations must be reviewed within the larger context of the overall and sizable body of ornithological field work conducted in Arizona during the same time period. Third, the findings of these inquiries must be compared to the status of this owl in Arizona as we know it today. Only by use of such three-part analysis can it be objectively determined whether substantial evidence exists in support of either the designation of critical habitat or the adoption of a down-listing plan for this owl in Arizona.

3. Analysis Of The Cactus Ferruginous Pygmy Owl's Historic And Current Status In Arizona

Use of the word "common," in reference to the Cactus ferruginous pygmy owl in Arizona, is attributable to Breninger (1898), who states: "Among the growth of cottonwood that fringes the Gila and Salt rivers of Arizona this Owl is of common occurrence." He concludes his one-page contribution to the "Osprey" by stating: "In more recent years, and since trees planted by man have become large enough to afford nesting sites for woodpeckers, this Owl has gradually worked its way from the natural growth of timber bordering the banks of irrigating canals, until now it can be found in places ten miles from the rivers."

While Breninger did collect a single specimen of this owl in Phoenix, in 1897, he quantifies neither the time he spent in the field nor the specific locations he visited which led him to conclude that the Cactus ferruginous pygmy owl was then "common" along both Salt and Gila Rivers in its regular state of occurrence. Thus, because Breninger's observation of commonality was local in nature and does not provide any information on what, other than the collection a single specimen in Phoenix, it is based, Breninger does not provide substantial evidence for the Service's claim that this owl was common and regular in its historic state of occurrence across the lowlands of central and southern Arizona.

The use of the term "not uncommon" in description of this owl's historic occurrence in Arizona is attributable to Scott (1886), and applies only to its presence in the immediate vicinity of Tucson during the 1880s. According to Scott (1886): "Not uncommon about Tucson. I have no record of its occurrence at other points, but have strong reasons for believing it obtains not at all rarely throughout this entire region up to an altitude of at least 5000 feet."

Scotts's assertion that the Cactus ferruginous pygmy owl was found throughout this entire region of southern Arizona (up to at least 5000'), however, is much more reflective of the then-unsettled taxonomy of pygmy owls than it is of this particular species' then-actual state of occurrence in Arizona. Because neither Scott (1886) nor Visher (1910) make any reference to the Northern pygmy owl in southern Arizona, which is by far the most common species of pygmy owl recognized in this region today, it can be objectively concluded that two separate species of pygmy owls were not then recognized by the ornithological community as occurring in southern Arizona.

Further evidence that the Northern pygmy owl was not viewed as separate from the Cactus ferruginous pygmy owl during that time period is provided by Visher (1910), when he states in regard to the latter: "These birds were very common in the oak zone in June." In point of fact, however, Cactus ferruginous pygmy owls are not known from the oak zone in Arizona. Thus, the species to which Visher undoubtedly refers must be its higher elevational cousin, the Northern pygmy owl, which to this day is very commonly encountered in the oak zone of southern Arizona during the month of June.

It is of further importance here to note that Scott's 1886 observation regarding Cactus ferruginous pygmy owls in Arizona is limited to the Tucson area only, notwithstanding his collection of some 4000 specimens of birds from southern Arizona, a large number of which were secured by him along the Gila, San Pedro and Santa Cruz rivers, plus numerous specimens from this area loaned to him by the famed Tucson-based collector, Herbert Brown. Review

of Brown's extensive field ornithological notes reveals mention of collection or encounter with Cactus ferruginous pygmy owls in the vicinity of Tucson on only one occasion (1884, along the Santa Cruz river about 5 miles south of Tucson). Thus, because Scott's 1886 observation that this owl was "not uncommon about Tucson," was highly localized in nature and apparently based on Brown's one encounter with this owl rather than his own, Scott does not provide substantial evidence for the Service's claim that the Cactus ferruginous pygmy owl was common and regular in its historic state of occurrence across the lowlands of central and southern Arizona.

Moreover, if Cactus ferruginous pygmy owls were common and regular in their historic state of occurrence about Tucson, then a collector of the magnitude, reputation, and proficiency of one Herbert Brown would have surely encountered them in that area on more than one occasion during that time period. As Brown's field notes conclusively show, however, he did not. Brown encountered the Cactus ferruginous pygmy owl in the vicinity of Tucson only once. Therefore, the best scientific and commercial information available provides substantial, factual evidence in support of the conclusion that Cactus ferruginous pygmy owls were very rare to uncommon in their historic state of occurrence in and about Tucson. It thus necessarily follows that neither Scott nor Brown provide substantial evidence for the Service's claim that Cactus ferruginous pygmy owls were of regular and common historic occurrence across the lowlands of central and southern Arizona.

Furthermore, if these owls were common and regular in their historic condition of occurrence along the Gila and San Pedro Rivers, as the Fish and Wildlife Service also claims, then it similarly must follow that Scott would have encountered them with some degree of regularity along both of these rivers. In point of fact, however, Scott never did encounter any Cactus ferruginous pygmy owls along either the Gila or San Pedro Rivers, or along Rillito Creek for that matter, over the course of his extensive field work in Arizona conducted during the years 1882-1886.

According to Scott (1886): "The collections I have made in this area aggregate a little over 4000 birds. At Florence and Riverside, and in the vicinity of these places, in the spring of 1882, four hundred birds were collected and notes made on that part of the territory. At Mineral Creek, in October and November of the same year, about six hundred birds were added. On the San Pedro Slope of the Santa Catalinas, and incidentally in the valley of the San Pedro, and in the pine forests of the Santa Catalinas, during the past two years, somewhat more than three thousand birds have been obtained."

In short, if Cactus ferruginous pygmy owls were of common and regular occurrence along the Gila and San Pedro Rivers during the 1880's as the Fish and Wildlife Service claims, then Scott would have undoubtedly encountered them. The fact that he did not therefore provides substantial and convincing evidence in support of the conclusion that this owl was at best extremely rare, local, and sporadic in its historic state of occurrence along both the Gila and San Pedro Rivers during the 1880's. Thus, once again, Scott does not provide substantial evidence that this owl was historically of regular and common occurrence along either of these rivers, or across the lowlands of central and southern Arizona, as the Service conversely claims.

Inconsistency between this owl's actual historic status and the Fish and Wildlife Service's converse claim of historic commonality also exists along Rillito Creek near old Camp Lowell in Tucson, where Bendire (1888) first encountered this owl in Arizona, in 1872. Bendire took the first specimen of this species known from the United States (January 24, 1872), and collected "several" others (3 confirmed) in the dense mesquite thickets then bordering Rillito Creek the ensuing spring and summer of that same year. Nine years would pass, however, before another single specimen of this owl was collected near old Camp Lowell, when Stephens took one there in 1881, and nearly 35 more years would pass again before another single specimen of this owl was taken near old Camp Lowell by Howell in 1915 or 1916.

Moreover, Scott did not encounter this owl at old Camp Lowell or along Rillito Creek in 1885. Willard (1912) did not encounter this owl at old Camp Lowell or anywhere else in southern Arizona in 1911, and Brown never did personally encounter this species along Rillito Creek. Thus, again, the Fish and Wildlife Service's claim that Cactus ferruginous pygmy owls were historically of common and regular occurrence along Rillito Creek near old Camp Lowell is not supported by objective review of the historic record. Therefore, it must necessarily follow that the historic record of ornithological work along Rillito Creek near old Camp Lowell does not provide substantial evidence for the Service's further claim that Cactus ferruginous pygmy owls were regular and common in their historic state of occurrence across the lowlands of central and southern Arizona.

It is also of importance here to note that of the 650 birds collected by Stephens in southern Arizona during 1881, only **one** Ferruginous owl was among the aggregate (Brewster, 1883). Moreover, neither Stephens (1885) nor Swarth (1905) encountered any Cactus ferruginous pygmy owls in Arizona during 1884 and 1902-03, respectively.

Although Swarth spent considerable time collecting birds within the magnificent mesquite forest then extant along the Santa Cruz River south of Tucson on the Tohono O'Odham

Reservation, he encountered no Cactus ferruginous pygmy owls within that forest in either 1902 or 1903. According to Swarth (1905), ..."I have thought it best to make separate lists of the species seen along the Santa Cruz River, and in the Santa Rita Mountains. The first mentioned list is, I think, fairly complete, for I know of hardly any species that might be expected to occur in this region during the summer months that we failed to meet with."

The Cactus ferruginous pygmy owl is not found on Swarth's list of birds for the Santa Cruz River. Thus, the Fish and Wildlife Service's further claim, that these owls were common and regular in their historic state of occurrence along this stretch of the Santa Cruz River, is a claim actually contradicted by Swarth. Therefore, Swarth does not provide substantial evidence, or any evidence whatsoever, for the Service's claim that Cactus ferruginous pygmy owls were historically of regular and common occurrence across the lowlands of central and southern Arizona.

Use of the term "fairly numerous" in regard to this owl's local, historic occurrence in Arizona is attributable to Gilman (1909), who observed that Cactus ferruginous pygmy owls were "fairly numerous" along the Gila River in the vicinity of Casa Grande during the 1908-1909 field season. Mention of the Cactus ferruginous pygmy owl at Casa Grande is also made by Fisher (1893), who states: "A specimen captured by Dr. E. A. Mearns at Casa Grande, Ariz., May 10, 1885, contained the remains of a lizard."

Fisher (1893) also reports that he ..."found this species quite common at New River, thirty-five miles NNW of Phoenix, in June, 1892. Two specimens were secured and several others observed among the mesquit and other thick shrubbery scattered through groves of giant cactus."

Fisher's (1893) and Gilman's (1909) observations, however, are limited to singular seasons of study and pertain only to certain and specific locations. Moreover, as the sizable body of ornithological field work accomplished in Arizona during the same time period strongly cautions, isolated and localized observations of this owl's presence recorded in singular field seasons cannot be objectively boot-strapped to provide substantial evidence for the proposition that these owls were common and regular in their historic occurrence across the lowlands of central and southern Arizona. This conclusion is made all the more clear when it is further considered that no specimens of this owl were ever collected again along either the Gila River near Casa Grande or at New River. Thus, once again, the Fish and Wildlife Service's claim that this owl was common and regular in its historic state of occurrence across the lowlands of central and southern Arizona is unsupported by substantial evidence provided by either Gilman or Fisher.

Conversely, the objective conclusion supported by substantial evidence is that Cactus ferruginous pygmy owls were very rare to uncommon and of highly sporadic and localized occurrence in Arizona during the historic period (1872-1950). Moreover, this conclusion is consistent with the condition of presence expected for a species at the very northernmost fringe of its inhabitable range, as well as with the small number of specimen-documented records for this owl in Arizona (13) that exist from the entire historic time period.

While the Fish and Wildlife Service claims that the numbers of these owls recorded in Arizona during 1999 to 2002 also provide substantial evidence for this owl's precipitous decline from a state of historic commonality, in actuality, both the frequency and number of verified owls recorded in Arizona from 1999 thru 2002 far exceeds the record of this species' occurrence in Arizona during the whole of the historic period.

According to the Fish and Wildlife Service, surveys documented the presence of 41 adult Cactus ferruginous pygmy owls in Arizona in 1999, 34 in 2000, and 36 in 2001. In 2002, only 18 were detected -- a condition thought by the Service to be related to the prolonged drought of current occurrence in Arizona.

In Sonora, where Russell and Monson (1998) recorded no decline in this owl's numbers, and where livestock restriction is nonexistent, survey efforts resulted in 279 confirmed detections of this owl in 2000. Twenty-six Cactus ferruginous pygmy owls were detected within six miles of the Arizona border (Flesch and Steidl 2000) (Draft Recovery Plan at page 13).

Thus, if most of these recently detected owls had been collected -- as they surely would have during the late 1800's and early 1900's -- such a series of specimens would more than triple the historic number of specimens of Cactus ferruginous pygmy owls known from Arizona and exponentially increase the number of specimens known from Sonora. Rather than providing evidence for the Fish and Wildlife Service's claim of precipitous decline, these recent numbers, when compared with the historic record of this species' occurrence in Arizona, provide substantial evidence for the objective conclusion that the status of this owl remains relatively unchanged while population numbers have increased slightly in Arizona over the past one hundred and thirty years. It therefore must follow that the Fish and Wildlife Service's claim to the contrary is contradicted by the weight of substantial evidence provided by objective analysis of the best scientific and commercial information currently available.

4. Analysis Of The Proposals Of Critcal Habitat Designation And A Draft Recovery Plan For The Cactus Ferruginous Pygmy Owl In Arizona

"Critical habitat" is defined as the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features which are essential to the conservation of the species and which may require special management considerations and protections. In 1978, Congress amended the Endangered Species Act to require critical habitat designations to be based not only on the best scientific and commercial information available, but also on the economic impact of such designation. Thus, the economic impact of designating an area as "critical habitat" must be weighed against the benefit to the listed species by the designation unless the Secretary determines that failure to designate an area as "critical habitat" will result in the extinction of the species. If the Secretary makes such a determination, no economic factors may be used in the decision making process.

Substantial evidence is the standard for deciding whether the designation of critical habitat is warranted. Thus, if a decision to designate critical habitat contradicts the best scientific and commercial information available, or is not objectively based on such information, it is unlawful.

Here, because the Secretary has not determined that the failure to designate critical habitat will result in the extinction of the Cactus ferruginous pygmy owl, economic factors must be used in the decision making process. Thus, the economic impacts of designating nearly 1.2 million acres of central and southern Arizona as critical habitat must be weighed against the benefit to Cactus ferruginous pygmy owls provided by the designation.

The benefit to Cactus ferruginous pygmy owls must be evaluated by substantial evidence derived solely from objective analysis of the best scientific and commercial information that is currently available. Thus, any decision to designate critical habitat that contradicts the best scientific and commercial information available regarding the species of concern, or that does not objectively rely on such, is unlawful.

Here, as the above-presented analysis clearly shows, the best scientific and commercial information available provides substantial evidence in contradiction of the Fish and Wildlife Service's fundamental claim that Cactus ferruginous pygmy owls were so common and regular in their historic occurrence in Arizona, and their subsequent decline so precipitous, that designation of critical habitat is essential. Conversely, objective analysis of the best scientific and commercial information available provides substantial evidence in support of the conclusion that this owl's status in Arizona remains relatively unchanged while population numbers within Arizona have increased slightly over the past 130 years. Therefore, because the Fish and Wildlife Service's proposal of critical habitat for

this owl in Arizona is contradicted by the best scientific and commercial information available and lacks objectivity, a decision by the Service to designate critical habitat for this species in Arizona would be unlawful.

Moreover, the Fish and Wildlife Service is required to use solely the best scientific and commercial information available when evaluating the benefit of critical habitat designation for a particular species. Here, however, the Service's proposal of critical habitat designation for the Cactus ferruginous pygmy owl incorporates and emphasizes "many of the recognized tenets of conservation biology." The Service's use of these "tenets" in proposing critical habitat designation for this owl is therefore as instructive as it is unlawful.

Because a "tenet" is defined as a "doctrine, dogma, opinion, or belief held or maintained as true," a tenet is not scientific evidence, but merely a philosophy. Moreover, because only scientific evidence may be taken into account when evaluating the benefit of critical habitat designation for Cactus ferruginous pygmy owls in Arizona, and because a tenet is by definition not scientific evidence, the Service's current proposal of critical habitat designation for this owl incorporating and emphasizing the use of tenets in the evaluative process is clearly unlawful.

That the Service further and unlawfully incorporates and emphasizes these tenets in the recommended recovery strategy for the Cactus ferruginous pygmy owl, is illustrated by its current proposal of a recovery plan for this species in Arizona that seeks merely its down-listing rather than its delisting. The Endangered Species Act requires that a recovery plan must contain objective, measurable criteria for delisting -- not down-listing -- the particular species of concern, and further requires that the plan address each of five statutory factors, even if some of those factors were not implicated in the original decision to list that species. Further, in preparing a recovery plan, the Fish and Wildlife Service must rely solely on substantial scientific evidence derived from objective analysis of the best scientific and commercial information that is currently available.

Here, however, the Fish and Wildlife Service is proposing, as a "recovery plan," a vague and open-ended strategy for the mere down-listing rather than the delisting of this owl. Moreover, this proposed plan does not contain objective, measurable criteria for delisting this owl, and, in fact, does not even contain objective, measurable criteria for the improper purpose of its down-listing. This is because the plan does not specify either a target population size for delisting or an estimated target date when such might be expected to occur.

Instead, the Fish and Wildlife Service states that it will set a target population size and an estimated target date for down-listing this owl in Arizona sometime in the future and after it collects unspecified, but currently missing, information it nonetheless describes as "essential." This approach is unlawful for two reasons.

First, because this draft recovery plan aims only at the improper goal of down-listing and fails to set either a target population size or an estimated target date for this owl's delisting, it does not contain the objective, measurable criteria for delisting this owl required by statute. Second, because this plan proposes to set both a target population size and an estimated target date for down-listing based on information that the Service does not now have but might obtain at some point in the future, it also violates the further statutory requirement that these determinations be made solely on the basis of the best scientific and commercial data that is currently available. Thus, because the currently proposed draft recovery plan for the Cactus ferruginous pygmy owl lacks objective, measurable criteria for delisting this species and is not supported by substantial evidence derived solely from objective analysis of the best scientific and commercial information currently available, it is violative of statutory requirements on both of these counts.

Moreover, although the Endangered Species Act requires every recovery plan to address each of five statutory factors, even if some of those factors were not implicated in the original decision to list, here, the Fish and Wildlife Service addresses only three of these five required factors in the proposed draft recovery plan for this owl. Thus, because the draft recovery plan fails to address each of the five statutory factors required by the ESA, it also violates this further statutory requirement as well.

5. Conclusions

Neither the current proposal of critical habitat nor the currently proposed draft recovery plan for the Cactus Ferruginous pygmy owl in Arizona is supported by substantial scientific evidence derived solely from objective analysis of the best scientific and commercial information currently available. Conversely, both are contradicted by objective analysis of the best scientific and commercial information currently available. Therefore, both are unlawful as currently proposed.

Moreover, the currently proposed draft recovery plan is unlawful for three additional reasons. First, the stated goal of this proposed draft recovery plan is not the delisting of this owl. Second, this plan does not contain objective, measurable criteria specifying either a target population size for delisting

or an estimated target date when such might be expected to occur. Third, this plan addresses only three of the five statutory factors required by the Endangered Species Act.

Further, both the proposal of critical habitat designation and the proposed recovery plan for this owl in Arizona are irretrievably flawed because both incorporate and emphasize the use of "tenets" within the scientific evaluative process in direct violation of the law and Congress's clearly expressed intent to the contrary. According to Congress:

> "The principal purpose of [the 1982] ammendments [to the ESA] is to ensure that decisions in every phase of the process pertaining to the listing or delisting of species are based solely upon biological criteria and to prevent non-biological considerations from affecting such decisions."

Whether many of the tenets of conservation biology are accepted by the Service is therefore not relevant to the resolution of the issues at hand. The fact of the matter is that the Fish and Wildlife Service is precluded by law and Congress's clearly expressed intent from injecting philosophical dogma into the scientific evaluative process.

What is relevant here, is that the Fish and Wildlife Service has nevertheless unlawfully incorporated and emphasized these tenets at the expense of objective scientific evidence in both its currently proposed designation of critical habitat, and its current proposal of a recovery plan for this owl that doesn't seek its recovery in Arizona. As the above-presented analysis and the comments of the Chilton family attached here forthwith clearly show, this unlawful approach has led to biased and inaccurate determinations by the Service that will have grave and costly socio-economic impacts if imposed, while providing no legitimate benefit for this owl. Thus, for all of the reasons stated, the Service must withdraw both of these currently proposed rules.

ATTACHMENT "B"

CHILTON RANCH & CATTLE COMPANY
17500 West Chilton Ranch Road
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Arivaca, AZ 85601

March 23, 2003

Steve Spangle
Field Supervisor
Arizona Ecological Field Services Office
2321 West Royal Palm Road
Phoenix, Arizona 85021

Re: Comments on the Cactus Ferruginous Pygmy-owl Critical Habitat and Draft Recovery Plan of January 2003

Dear Mr. Spangle:

We are deeply concerned that the referenced draft Recovery Plan and designated Critical Habitat will in no way accomplish their stated objectives and will instead:

1) Create barriers to on-going conservation work in the Altar Valley Watershed;

2) Take by regulation the property value of Altar Valley Watershed property owners;

3) Misdirect scarce resources from scientifically based, feasible projects to a project that has no probability of "success;"

4) Confirm in the mind of the members of the ranching culture that the law (ESA) continues to be chiefly a tool perverted to achieve a political goal: rural and cultural cleansing of the unique western cattle rancher/cowboy heritage.

The proposed "protective" actions for the CFPO are not logically derived from the clear choices made by the bird itself. Specific juxtapositions are as follows:

Fact: The CFPO survey (Flesch) located a nest by one of our corrals in the southern Altar Valley Watershed where a CFPO successfully fledged two offspring in one of the large ash trees on our private property along the immediately adjacent wash.

False hypotheses of draft plan: -The CFPO is negatively affected by cattle ranching;
-The nest site is disturbed by ranching activities which should be controlled and curtailed;
-Noise associated with gathering, branding, etc. makes the CFPO move the nest site;
-Present level of livestock use along adjacent wash makes nest sites unavailable.

Logical hypotheses:

-CFPO **chose** this pasture/corral area because it supplies abundant prey and reliable water along an otherwise ephemeral wash;
-Present grazing program has allowed growth of various sizes of ash trees that provided a nest site selected by the CFPO;
-Ranch-related improvements and management caused the CFPO to select the site over neighboring **ungrazed** and similarly vegetated Buenos Aires Refuge riparian washes (no grazing for 18 years on BANWR)

Fact: The largest concentration of CFPO's in Pima County selected a north Altar Valley ranch with an extensive decades-long burning and mechanical range improvement program and well over a century of continuous livestock grazing. They have been repeatedly documented to nest successfully on these pastures.

Recovery Plan false conclusion:

-Controlled burning and mechanical range improvement programs should be restricted because they may harm habitat and negatively affect recovery;
-Ranching activities disturb CFPO and grazing degrades or eliminates nesting habitat;
-Present riparian or xeroriparian plant community must be inadequate and measures should be taken to reduce or further control livestock utilization.

Logical hypotheses:

-Birds have selected ranch pastures and upland pasture sites over the ungrazed neighboring Refuge with dense unused vegetation because they prefer the habitat on the ranch;
-Burning and ranch range improvement programs have created preferable patchy shelter, nesting and foraging habitat;
-The present controlled burn and grazing program should be evaluated to determine why it is creating habitat selected by the CFPO.
-Controlled burning and rest/rotation grazing programs should be encouraged on more ranches in the Altar Valley Watershed and on the Buenos Aires Refuge.

Fact: CFPO was found in a palm tree in the town of Sasabe along main highway through the Altar Valley into Mexico.

Recovery Plan false implication: -The bird would be happier in the ungrazed, un-built,

un-trafficked neighboring Buenos Aires Refuge because grazing,
residential and commercial building and traffic disturb the CFPO.
-Every restriction in the Recovery Plan should tend to make all critical habitat as much like habitat on the Refuge as possible by permitting the least possible human use that will be politically tolerated.

Logical Hypotheses: -Once again, the CFPO indicated by its own selection of habitat that it preferred the roadside town site to the surrounding Buenos Aires Refuge.
-The townsite provided greater access to its survival needs than was provided by the extensive adjacent "protected" area.

Fact: Nearly half of the total Pima County CFPO population (the half not located on working ranches in the Altar Valley Watershed) selected low density DEVELOPED areas of Tucson for living and nesting; one CFPO was reported from the Organ Pipe National Monument nearer the larger Mexican CFPO population.

False Hypothesis: -The owl "needs" habitat like that on the Organ Pipe National Monument along the Mexican border and less like that in Northwest Tucson low density development areas; therefore we can and should use the CFPO to prevent property owners from utilizing their rural homestead zoning and constructing housing with surrounding open space like that chosen by the CFPO over as-yet-undeveloped areas near Tucson.

Logical Hypothesis: -We should look at the characteristics of the low-density housing areas to see why the CFPO is selecting these living quarters.
-The CFPO is a scientifically inappropriate tool to advance the agenda of no-growth activists.

Question: Why is the draft Recovery Plan consistently ignoring and denying the birds' own voice in its habitat selection? Why is the plan totally focused on converting habitat selected by the CFPO into habitat more like that NOT SELECTED by the birds?

The Draft Recovery Plan recognizes that southern Arizona is on the extreme northern fringe of the CFPO range, but then observes that there is "less movement into Arizona by Mexican populations of the species" than hoped. **Of course there are generally lower population numbers and less density at the fringe of a range**. Isn't this perfectly normal for any species? Animals generally only move to the less climatically desirable

edges of their range when displaced by competition or other forces from the core of their range. Why is the plan trying to tell the bird that the northern fringe of its range should be its primary habitat? Isn't this effort on the historical periphery of the range a set-up for failure if success is defined as making the CFPO change its mind about what area it prefers?

We believe that ample evidence indicates that the illogical Draft Recovery Plan with its enormous, land-grabbing Critical Habitat is an overt advancement of the agenda of groups whose stated purpose is the eradication of the ranching culture and its communities and traditions dating to the late 1600's when Fr. Eusebio Francisco Kino, S.J. brought cattle from Mexico to the earliest mission settlements in Arizona. The inclusion of huge areas of federally-managed land in the Critical Habitat effectively adds another major obstacle to the NEPA process for grazing leases even on allotments where the owl has never been located.

Additionally, we believe that the Data Quality Act (44 U.S.C. 3502) together with the *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies (67 F.R. 8452,(Feb. 22, 2002)* specifically requires the U. S. Fish and Wildlife Service to adhere to recently developed data quality guidelines to ensure that claims disseminated by the Agency in such documents as the CFPO Recovery Plan and proposed Critical Habitat Designation are objective, logical and supportable. The Data Quality Act clearly requires the U. S. Fish and Wildlife Service to assure the quality and integrity of data and the objective analysis of the data. Congress' intent, when it passed the Data Quality Act, was to prevent harm done by an Agency when it uses false hypotheses rather than logical hypotheses. Since the assertions in the Recovery Plan do not logically follow from the data, we ask that you inform us as to the steps to be taken to remedy this inconsistency.

The Draft Recovery Plan has become another immoral tool for "rural cleansing." It reduces our land value, prevents or delays conservation work, impedes our long-established daily ranch business and creates a morass of regulations with concomitant threats of legal action. It becomes another wound to our rural economies and our western ranching heritage. It facilitates the conversion of our homeland into unpeopled unproductive "wildlands" with KEEP OUT signs. It commits all these crimes perversely in the name of a bird whose own choices consistently indicate that its survival is completely compatible with ranching as presently managed in our Altar Valley Watershed.

Sincerely,

Sue Chilton Jim Chilton

Sue, Jim, Ken III, Tomas, Jennifer and Ben Chilton
James Kenneth Chilton, Sr., Margaret Smith Chilton, Thomas B. Chilton, Katherine Chilton, John Chilton and Rebecca Chilton Peoples

ATTACHMENT "C"

Note: Neither Herbert Brown nor Scott are cited by the FWS although both were cited to the FWS in comment on the proposed rule to list the owl. 3 Brandt, Stephens, and Willard are also uncited although all were also cited to the Service in comment on the proposed rule to list

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